IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 16, 2006 Session

STATE OF TENNESSEE v. DALE ARISS ROBINSON

Direct Appeal from the Criminal Court for Knox County
No. 76782 Mary Beth Leibowitz, Judge

No. E2005-01089-CCA-R3-CD - Filed July 25, 2006

A Knox County Criminal Court jury convicted the appellee, Dale Ariss Robinson, of aggravated sexual battery, and the trial court sentenced him to seven years, two months in confinement. In this appeal, the State claims that the trial court improperly refused to apply an enhancement factor to the appellee's sentence, which resulted in the appellee's being improperly sentenced as an especially mitigated offender. Upon review of the record and the parties' briefs, we agree with the State, modify the appellee's sentence to reflect that he is a Range I, standard offender who must serve eight years in confinement at one hundred percent, and remand the case to the trial court for entry of a corrected judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed as Modified and Case Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Paul G. Summers, Attorney General and Reporter; Leslie Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Kevin Allen, Tonya Keith, and Joe Lodato, Assistant District Attorneys General, for the appellant, State of Tennessee.

Randall J. Kilby (on appeal) and Kenneth F. Irvine, Jr., (at trial), Knoxville, Tennessee, for the appellee, Dale Ariss Robinson.

OPINION

I. Factual Background

Pamela Skidmore testified at trial that her son, the victim, was born on September 15, 1989. She said that she had known the appellee for about eight years, that he was a "family friend," that he was like a brother to her, and that she trusted him. Skidmore also trusted the appellee with her children and allowed them to be around him. In the fall of 2002, the appellee spent time with the

victim "like an uncle would." On September 4, 2002, the appellee took the then twelve-year-old victim to a cookout. Later that evening, Knoxville police telephoned Skidmore. Skidmore said that she knew the appellee was taking medication but that she never saw him exhibit any unusual behavior.

The fifteen-year-old victim testified that he had known the appellee for about five or six years, that they had a good relationship, and that the appellee was like an uncle to him. The victim and the appellee went places together, and the victim acknowledged that he trusted the appellee. On September 4, 2002, the appellee picked up the victim from school, and the appellee and the victim drove to Knoxville in order for the appellee to visit a friend. The appellee and the victim headed home a couple of hours later. While the appellee was driving on the interstate, he began rubbing the victim's legs, unzipped the victim's pants, and pulled them down. The appellee turned on the light in the truck and began playing with the victim's penis. After the appellee exited the interstate, the police pulled him over. The police asked the victim what happened, and the victim told them. The victim never noticed any unusual behavior by the appellee.

The parties read into evidence the deposition of truck driver Darren Held. According to Held, he was driving west on Interstate 40 through Knoxville on September 4, 2002. He looked to his left and saw a white pickup truck with the interior light on. Held saw a man in the truck making some type of motion with his hand and believed the man was masturbating a young boy. Held telephoned the police, reported the pickup's license plate number, and gave the police a description of the vehicle. Held also used his citizen band (CB) radio to ask other truckers to keep an eye on the pickup. He was unable to keep up with the pickup, but some truckers told Held that the pickup exited the interstate. Held telephoned the police to update the pickup's location, and the police asked Held to pull over and give a statement.

Lenoir City Police Detective Jonathan Sarten testified that on September 4, 2002, patrol officers requested that he come to the Weigels store on McGee Boulevard. When Detective Sarten arrived, he saw that officers had stopped a vehicle. Officer Jamie Whitt told Detective Sarten that dispatch had received a call about a man fondling a young boy in a vehicle traveling west on Interstate 40. Detective Sarten read the appellee his rights. The appellee gave a statement, and Detective Sarten wrote out the statement for him. According to the written statement, the appellee and the victim left Knoxville about 9:30 p.m. and drove west on Interstate 40. Between the Lovell Road and Campbell Station Road exits, the appellee began rubbing the victim's penis. The victim "pulled it out," the appellee played with the victim's penis for four to six minutes, and the victim zipped up his pants. A few minutes later, the police stopped the appellee in Lenoir City. Detective Sarten said that the appellee was nervous but that he did not observe any unusual behavior.

Detective Larry Moore of the Knox County Sheriff's Department testified that on the evening on September 4, 2002, someone called 911 to report a white pickup truck on Interstate 40. According to the caller, the truck's interior light was on, and a young male passenger appeared to be exposed. Detective Moore responded to the scene, readvised the appellee of his rights, had the appellee sign a waiver of rights form, and audiotaped the appellee's statement. He never noticed

anything unusual about the appellee's behavior, and the appellee never said anything about not being competent to sign the waiver of rights form. The appellee's audiotaped statement was played for the jury, and his audiotaped statement is similar to his written statement.

The appellee acknowledged that he fondled the victim but testified that he did not remember doing so. He said that in September 2002, he was under Dr. Pete Stimpson's care and that Dr. Stimpson had been treating him since the late 1990's for two herniated discs in his back. Dr. Stimpson prescribed medicine for the appellee's back pain. Dr. Stimpson also gave the appellee a prescription for depression even though the appellee never told Dr. Stimpson he was depressed. Dr. Stimpson kept prescribing medicines for the appellee, and, at one point, the appellee was taking about twelve medications per day and twenty-five pills at bedtime. The appellee was an alcoholic, but Dr. Stimpson never told the appellee what might happen if he drank alcohol with his medications. Dr. Stimpson also never explained to the appellee what effects the medications would have on him. After the incident in question, the appellee stopped drinking alcohol and began seeing a new doctor, who immediately took him off five medications. The appellee said that he suffered short-term memory loss due to taking all the medications Dr. Stimpson prescribed. On cross-examination, the appellee stated that he had been on the medications for eight to nine months at the time of this incident and that he never questioned Dr. Stimpson about the medications.

Sandra Foister, the appellee's sister, testified that the appellee was fun-loving and very caring while they were growing up. For the past five to six years, the appellee had been living with his mother most of the time but had also lived with Foister and her husband. When the appellee began seeing Dr. Stimpson, he became very withdrawn and paranoid. He could not carry on a conversation "unless you just really pulled it out of him" and would not shower or change clothes for four or five days, which was unusual because he had always taken pride in his appearance. The appellee would fall asleep during conversations or while eating dinner. One night in 2002, the appellee's mother telephoned Foister. In response to the call, Foister and her husband went to her mother's house. The appellee was sitting on the floor of his room and appeared to be talking to his son like his son was a child. At the time of the incident, the appellee's son was grown and lived in Florida. Once the appellee changed doctors, he began to improve slowly. On cross-examination, Foister acknowledged that she loved the appellee.

Dr. Harvey Kaufman, a psychologist and psychopharmacology expert, testified that he is trained in medications that deal with mental illness and reviewed the appellee's medical and pharmacy records. In August and September 2002, the appellee was taking the addictive painkiller Oxycontin. Given the appellee's addiction to alcohol, Dr. Kaufman stated that Dr. Stimpson should not have prescribed Oxycontin for the appellee. The appellee was also taking Seroquel, an antipsychotic that impairs a person's judgment and memory, and Valporic Acid, a mood stabilizer that can cause terrible adverse reactions. In addition to these drugs, the appellee had been prescribed the antidepressants Remeron, Serzone, and Celexa; Ocuflox, an antibiotic; Zantac, an antacid; Clonazepam and Doxepin for anxiety; and Celebrex, an anti-inflammatory drug. The appellee told Dr. Kaufman that he was taking over thirty pills per day. Dr. Kaufman stated that the appellee's medical case was handled very poorly, that Dr. Stimpson never performed laboratory work to check

the levels of the medications in the appellee's body, and that the levels could have been toxic. Many of the appellee's drugs were addictive and could have caused confusion, dizziness, impaired judgment, and short-term memory loss if taken in excessive amounts. Dr. Kaufman said that they also could have caused disinhibition, "which means you just do things . . . you wouldn't necessarily do." The drugs would have affected the appellee's behavior, and the appellee would have been "a walking zombie most of the time." Dr. Kaufman stated that it was inappropriate for the appellee to have been taking all of the medications and "[t]hat he survived is amazing." On cross-examination, Dr. Kaufman acknowledged that the defense was paying him to testify and that he did not interview Dr. Stimpson. Although he interviewed the appellee, the appellee was not on all of the medications at the time of the interview, and Dr. Kaufman did not observe any of the medicines' side effects firsthand. The jury convicted the appellee of aggravated sexual battery, a Class B felony.

At the sentencing hearing, no witnesses testified. However, the State introduced several documents into evidence, including Dr. Kaufman's report and the appellee's presentence report. According to the presentence report, the then sixty-one-year-old appellee was divorced and had a thirty-five-year-old son. He did not graduate from high school and never obtained a general equivalency diploma (GED). He reported being in poor physical and mental health, stating that he was suffering from depression and back problems. In the report, he said that he had not consumed alcohol since 2002, and he denied using any illegal drugs. The report shows that the appellee worked in the receiving department for Maremont from September 1993 until he injured his back in August 1998. Due to his back injury, the appellee was no longer able to work and was receiving social security disability payments. The appellee addressed the court, stated that he was sorry, and apologized to the victim and the appellee's family.

In mitigation, the appellee argued that "[s]ubstantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense"; that he was "suffering from a mental or physical condition that significantly reduced [his] culpability for the offense"; and that he "committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct." Tenn. Code Ann. § 40-35-113(3), (8), (11). The trial court determined that the appellee "certainly has a significant medical condition involving depression" and stated that it would consider the three mitigating factors as one factor. The trial court also took into consideration the appellee's not having any prior convictions, his substantial work history, and his remorse. See Tenn. Code Ann. § 40-35-113(13). The trial court stated that the appellee "[c]ertainly . . . violated a position of trust." See Tenn. Code Ann. § 40-35-114(16) (2003). However, the court concluded that it could not apply enhancement factor (16) to the appellee's sentence in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Because no enhancement factors could be applied, the trial court concluded that the appellee was an especially mitigated offender.[1] Given that the minimum punishment in the range for a Class B

[1]We note that in classifying the appellee as an especially mitigated offender, the trial court stated, "I think I'd be reversed if I didn't." However, even if a defendant is eligible for especially mitigated offender status, sentencing the defendant as an especially mitigated offender is discretionary, not mandatory. See Tenn. Code Ann. § 40-35-109(a) (stating that a court "may find the defendant is an especially mitigated offender") (emphasis added).

felony is eight years, the trial court sentenced the appellee to seven years, two months in confinement. See Tenn. Code Ann. § 40-35-109(b) (providing for the reduction of an especially mitigated offender's sentence by ten percent). However, the trial court noted that the appellee was statutorily required to serve one hundred percent of the sentence. See Tenn. Code Ann. § 40-35-501(i)(2)(H).

The State immediately filed a motion to reconsider, arguing that enhancement factor (16) applied to the appellee's sentence, and, therefore, that the trial court could not sentence him as an especially mitigated offender. In a written order, the trial court noted our supreme court's recent holding in State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005), which was filed the day after the appellee's sentencing hearing. However, despite Gomez, the trial court "affirm[ed] its judgment of 7.2[] years as an especially mitigated offender at 100%." In affirming the appellee's sentence, the trial court also cited State v. Blackstock, 19 S.W.3d 200, 212 (Tenn. 2000), in which our supreme court concluded that this court should not have applied enhancement factor (16) in light of the defendant's mental retardation.

II. Analysis

The State claims that pursuant to Gomez, the trial court improperly concluded that Blakely prohibited the court from applying enhancement factor (16) to the appellee's sentence. The appellee claims that the trial court did not find that any enhancement factors applied in this case and that this court should affirm his sentence as an especially mitigated offender. In support of his argument, he notes that in the trial court's order denying the State's motion to reconsider his sentence, the trial court stated that "the only [enhancement] factor which even could remotely apply was an abuse of trust." However, upon our de novo review, we conclude that enhancement factor (16) applies in this case and sentence the appellee accordingly.

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of a sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

At the time the appellee committed the offense in question, the trial court was to begin at the presumptive minimum, then "enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence as appropriate for the mitigating factors." Tenn. Code

Ann. § 40-35-210(e) (2003). The appellee was convicted of a Class B felony, and the presumptive sentence for a Class B felony is the minimum sentence within the appropriate range. See Tenn. Code Ann. § 40-35-210(c) (2003). Therefore, as a Range I, standard offender, the appellee's presumptive sentence is eight years. See Tenn. Code Ann. § 40-35-112(a)(2). However, if a defendant has no prior felony convictions and the trial court finds mitigating but no enhancement factors, the trial court may sentence him as an especially mitigated offender. See Tenn Code Ann. § 40-35-109(a). As an especially mitigated offender, a defendant is entitled to have his Range I minimum sentence reduced by ten percent. See Tenn. Code Ann. § 40-35-109(b).

Before the appellee's sentencing hearing, the United States Supreme Court filed Blakely, 542 U.S. at 296, 124 S. Ct. at 2531. Blakely did not dispute the appropriateness of a trial court's application of Tennessee Code Annotated section 40-35-114(2) (2003), the enhancement factor for a defendant's prior criminal history, but called into question the constitutionality of the application of the remainder of our statutory enhancement factors without such facts being found by a jury or admitted by a defendant. The day after the appellee's sentencing hearing, a majority of our supreme court held in Gomez that Tennessee's sentencing structure did not require the trial court to submit the enhancement factors to the jury for its determination. 163 S.W.3d at 661. In light of Gomez, we conclude that the trial court erred by holding that Blakely prohibited it from applying enhancement factor (16) to the appellee's sentence. Moreover, the trial court's reliance on State v. Blackstock is misplaced. In Blackstock, our supreme court held that enhancement factor (16) could not be applied to a mentally retarded defendant's sentence in light of the "unique circumstances" of that case, i.e., the defendant's having a "functioning level . . . no greater than a child of nine years of age--hardly older than the victim." 19 S.W.3d at 212. No such "unique circumstances" exist in the instant case. Accordingly, our review will be de novo with no presumption of correctness.

Upon our review of the enhancement factors, we believe factor (16), that the appellee "abused a position of public or private trust," applies to the appellee's sentence. In State v. Kissinger, 922 S.W.2d 482, 488 (Tenn. 1996), our supreme court held that

> [t]he position of parent, step-parent, babysitter, teacher, coach are but a few obvious examples. The determination of the existence of a position of trust does not depend on the length or formality of the relationship, but upon the nature of the relationship. Thus, the court should look to see whether the offender formally or informally stood in a relationship to the victim that promoted confidence, reliability, or faith.

Turning to the instant case, the victim's mother testified that she had known the appellee for eight years, that he was like a brother to her, that she trusted him with her children, and that she allowed her children to be around him. The victim testified that the appellee was like an uncle to him and that he trusted the appellee. The victim would go places with the appellee, and they would do activities together. We conclude that the appellee occupied a position of private trust in this family and abused that trust. Given the applicability of factor (16), the appellee cannot be sentenced as an

especially mitigated offender.

In mitigation, we agree with the trial court that the appellee deserves some credit for his prior work history, remorse, and lack of a prior criminal record. See Tenn. Code. Ann. § 40-35-113(13). Moreover, we do not believe that the enhancement factor outweighs the mitigating factors in this case. Therefore, the appellee will serve the minimum punishment in the range for a standard offender convicted of a Class B felony, eight years.

III. Conclusion

Based upon the record and the parties' briefs, we modify the judgment of the trial court to reflect that the appellee is to serve eight years in the Department of Correction as a Range I, standard offender. Statutorily, he is required to serve one hundred percent of the sentence with the potential to have his sentence reduced by fifteen percent for sentence reduction credits. We remand the case for entry of a judgment consistent with this opinion.

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NORMA McGEE OGLE, JUDGE